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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 738

KIEKHAEFER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER, KIEKHAEFER CORPORATION.

JAMES I. POOLE,
HERBERT P. WIEDEMANN,
735 North Water Street,
Milwaukee 2, Wisconsin,
Counsel for Petitioner.

BERNARD S. KUBALE,
735 North Water Street,
Milwaukee 2, Wisconsin,
Of Counsel.

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STATUTES AND RULES.

Paragraph 1 of Rule 24 of the Revised Rules of the Supreme Court of the United States provides in part as follows:

> "1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. * * *"

ARGUMENT.

I.

The Brief for the National Labor Relations Board in Opposition Was Not Timely Filed.

Paragraph 1 of Rule 24 of the Revised Rules of this Court provides that counsel for respondent shall have thirty days after receipt of a petition within which to file its opposing brief. In the instant case, J. Lee Rankin, Solicitor General, admitted service of Petitioner's Petition for Writ of Certiorari on February 29, 1960. Applying the thirty day time period set forth in paragraph 1 of Rule 24, the opposing brief was due March 30, 1960. The opposing brief was not filed with the Clerk of this Court until March 31, 1960, and, therefore, was not timely filed.

Petitioner calls this to the attention of this Court not in order to ask the Court to strike Respondent's brief, but rather because it is Petitioner's alleged filing of a statement of exceptions and brief one day late that has given rise to the instant case. Were Petitioner to move to strike Respondent's brief as untimely, it is a certainty that Respondent would argue that in the interests of equity and justice it should be heard (and Petitioner would agree). However, when Respondent received Petitioner's exceptions and brief one day late, it summarily refused to consider them. It is this type of arbitrary conduct by the National Labor Relations Board which brings into play the principles of equity, and as a court of equity (as well as a court of law), the lower court should have reviewed the merits of this case or remanded the case to the Board for consideration of the merits there.

II.

Petitioner Has a Right to Review of the Merits Under the Statute.

Conceding that the statement of exceptions and brief filed by Petitioner were filed one day late, Petitioner has a right to judicial review by the Court of Appeals of the merits of this case under Section 10(e) of the National Labor Relations Act (Section 160(e) of Title 29, U. S. C.). That section provides in part as follows:

> "* * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Petitioner, in fact, has a right to judicial review on two separate grounds. The first is that the trial examiner is an agent of the board, and since the objections urged before the court were urged before him, the above quoted language gives Petitioner a right to court review of such objections. The second is that even if the objections had not properly been urged at any level, the failure to urge them is excused because of extraordinary circumstances.

In spite of what Respondent may state the issues to be, Petitioner alleges that these two separate grounds for court review (which grounds Petitioner urged before the court below) are controlling, and the lower court's refusal to consider one (extraordinary circumstances are present) and its summary disposition of the other (the trial examiner as an agent of the Board) constituted judicial error calling for an exercise of this court's supervision.

III.

N. L. R. B. v. International Woodworkers (9 Cir., 1956), 238 F. 2d 378, Is Not Distinguishable.

Respondent in its brief contends that the instant decision is not in conflict with *N. L. R. B.* v. *International Woodworkers* (9 Cir., 1956), 238 F. 2d 378. Following the example of the lower court, it distinguishes such case on the grounds that there the failure to file the exceptions on time was excused because the office of the Board closed at 4:00 P.M. as a result of a severe snowstorm. (Resp. Br. 7) Respondent admits the decision of the court which decided the *Woodworkers* case did not mention a snowstorm, but states that the lower court in the instant case took "judicial notice" of the snowstorm in making its decision.

Petitioner contends that the argument of Respondent is *absolutely without merit.* The opinion of the court in the *Woodworkers* case does not include one word about a snowstorm. The record in that case does not include one word about a snowstorm. Under these circumstances how can the lower court in the instant case possibly state that the decision was as it was because of such snowstorm? Such a statement is completely contrary to both reason and justice.

Respondent explains the lower court's reference to the snowstorm by stating that the court took judicial notice of it. (Resp. 7) It would have been one thing for the court in the *Woodworkers* case to state in its decision that it would take judicial notice of the storm and excuse the late filing on that ground. That would be a valid use of judicial notice. However, it is completely another thing for the court in the instant case to take judicial notice of a ground for a decision which is not found anywhere in

the opinion or record. The lower court here is taking judicial notice not of the storm, but of the basis for the *Woodworkers* decision. This is clearly not a situation where the doctrine of judicial notice can be applied.

The fact that the exceptions in the *Woodworkers* case were mailed from Redding, California at 9:00 A. M., Pacific time, makes it certain that they could not possibly have reached the Board's office in Washington by 5:00 P. M., Eastern time, on that same day. Therefore, snowstorm or no snowstorm, the failure of the exceptions to reach the Board's office on time was due to one thing—late mailing.

The lower court's distinguishing of the *Woodworkers* case is clearly not based on proper grounds and therefore the decision of the lower court in the instant case and the decision in that case are in conflict.

IV.

The Trial Examiner as an Agent of the Board.

Respondent contends that to allow judicial review of an issue raised before the trial examiner but not included in exceptions properly filed with the Board would nullify a settled principle of judicial review. (Resp. Br. 7-8) Petitioner submits that there is no "settled principle" in regard to the question of whether the trial examiner is an agent of the Board.

Only one of the cases cited by Respondent in support of this "settled principle" actually deals with the question of whether the trial examiner is an "agent" of the Board, *Kovach* v. *N. L. R. B.* (7th Cir., 1956), 229 F. 2d 138. None of the others deal with this issue. A principle can hardly be settled if only one case has been decided supporting it. Further, the case of *N. L. R. B.* v. *Red Spot Electric Co.* (9th Cir., 1951), 191 F. 2d 697, holds contrary to the *Kovach* case that the trial examiner *is* an agent of the Board.

Respondent states that the Ninth Circuit in *N. L. R. B.* v. *Noroian* (9th Cir., 1951), 193 F. 2d 172, rejected its holding that the trial examiner was an agent of the Board. (Resp. Br. 8) This is clearly not true. In the *Noroian* case the issue of whether the trial examiner was an agent of the Board was not raised and in fact there is no mention whatever of whether any objections were urged before the trial examiner, which of course would be a prerequisite to raising the issue.

As to the general principle of judicial review where no exceptions are filed with the Board, there is ample authority for a court of equity's reviewing the merits of the case and refusing to summarily enforce the Board's order. In a case decided December 31, 1959, the Court of Appeals for the First Circuit refused to summarily enforce the Board's order in a fact situation very similar to that in the instant case. *N. L. R. B.* v. *Central Mercedita, Inc.* (1st Cir., 1959), 273 F. 2d 370.

In that case respondent had mailed its exceptions on the due date and they were received by the Board two days late. The Board rejected them and petitioned for summary enforcement of its order. The court refused to summarily enforce the order stating in its opinion that "It seems to us that under the circumstances the Board acted rather arbitrarily in defaulting the respondent because its exceptions were only two days late. * * *" P. 372. The court also cited its power as a court of equity to review the facts and circumstances of the case and noted that in "* * * the case at bar it is evident that * * * [it] is not one in which the respondent made no attempt to file exceptions to the Intermediate Report and offers no excuse for its failure to do so. * * *" P. 372. This same statement could be made as to the instant case and Petitioner contends that the decision in the *Central Mercedita* case is in conflict with the one now before this court.

It is interesting to note that after the court's refusal to grant summary enforcement of its order, the Board in the *Central Mercedita* case accepted the exceptions of the respondent and is considering the matter on the merits.

For other cases holding that a court of appeals as a court of equity can review the merits of a case, even where no objections have been urged previously, see *N. L. R. B.* v. *International Woodworkers* (9th Cir., 1956), 238 F. 2d 378, 379, *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944), *Federal Power Commission* v. *Arizona Edison Co.* (9th Cir., 1952), 194 F. 2d 679, 685-686, *Fong Sik Leung* v. *Dulles* (9th Cir., 1955), 226 F. 2d 74, 79, and *Brown* v. *Alaska Industrial Board* (9th Cir., 1955), 224 F. 2d 680, 682.

V.

Reasons for Granting Petition.

Petitioner submits that there are several separate reasons why its petition should be granted. First, the decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *N. L. R. B.* v. *Red Spot Electric Co.* (9th Cir., 1951), 191 F. 2d 697, with the decision of the Court of Appeals for the First Circuit in the case of *N. L. R. B.* v. *Central Mercedita, Inc.* (1st Cir., 1959), 273 F. 2d 370, and with the decision of the Court of Appeals for the Ninth Circuit in the case of *N. L. R. B.* v. *International Woodworkers* (9th Cir., 1956), 238 F. 2d 378. Second, the court below departed from the accepted and usual course of judicial proceedings in distinguishing the *Woodworkers* case and in refusing to consider the question of whether extraordinary circumstances were present in the instant case. Third, the question of whether the trial examiner is an agent of the Board is an important question of Federal law which has not been, but

should be, settled by this court. Fourth, the decision below is erroneous on both the issue of whether the trial examiner is an agent of the Board and whether extraordinary circumstances were present.

CONCLUSION.

For the reasons set forth above, individually and collectively, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES I. POOLE,
HERBERT P. WIEDEMANN,
735 North Water Street,
Milwaukee 2, Wisconsin,
Counsel for Petitioner.

BERNARD S. KUBALE,
735 North Water Street,
Milwaukee 2, Wisconsin,
Of Counsel.